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OGC 78-3937

15 June 1978

DD/A Registry

78-2421

MEMORANDUM FOR : Chief, Psychiatric Division
Office of Medical Services

STATINTL FROM : [REDACTED]
Office of General Counsel

SUBJECT : Reimbursement of Attorney's Fees

REFERENCES : A. Your Memo to General Counsel;
Same Subject, 18 January 1978
B. OGC Memo for DDM&S; Same
Subject, 11 July 1974
C. Attorney General Statement of Policy,
Order No. 683-77, 19 January 1977

1. Reference A sets forth a request for reimbursement for costs of attorney's fees incurred in connection with the performance of Agency duties. The fees were incurred in defending against charges of unethical exercise of your professional skills arising out of the preparation of a psychological profile at the Agency's behest.

2. On previous occasions when the opinion of this Office has been sought regarding this matter, we were forced to conclude that there was no statutory authority which would support the requested reimbursement. Reference B sets forth the legal analysis leading to this conclusion, and we believe it to be a correct interpretation of the applicable law. Since that time the Attorney General has promulgated guidelines regarding representation of Federal employees by, or at the expense of, the Department of Justice. However, the guidelines do not provide for representation in a situation, such as that in which you were dealing with your professional association, in which a Federal employee is not sued or subpoenaed in his individual capacity. Also the guidelines require advance approval for representation by legal counsel at government expense. Essentially, therefore, there have been no developments in the law which would warrant a change in the advice previously offered by this Office.

3. However, we have viewed your renewed request for reimbursement as an invitation to consider any and all possible avenues of relief under the peculiar circumstances of this case. As stated, there appears to be no legal

authority to pay for legal fees as requested. The very fact that there is no legal authority for payment, but yet an equitable claim for reimbursement exists, suggests consideration of what is referred to as the Meritorious Claims Act (31 U.S.C. § 236). The Act provides that when there is filed with the General Accounting Office a claim against the United States that may not lawfully be paid from any available appropriation, but which claim contains such elements of legal liability or equity as to be deserving of congressional consideration, the Comptroller General may elect to submit a special report to the Congress with a recommendation for relief. Such relief, of course, would take the form of a private bill appropriating the funds to discharge the claim deemed meritorious.

4. Such relief is extraordinary by its very nature and its use is limited to extraordinary circumstances. The cases reported by the Comptroller General for the consideration of the Congress generally have involved equitable circumstances of an unusual nature and which are not likely to constitute a recurring problem. The rationale here is that a report to the Congress in a particular case when similar equities exist or are likely to arise with respect to other claimants would constitute preferential treatment over others in similar circumstances. 53 Comp. Gen. 157 (1973). It has also been stated that the only claims considered under the Meritorious Claims Act are those that contain elements of legal liability or equity on which the General Accounting Office would take action and allow but for the fact that there is no appropriation available for their adjustment. This principle is set forth in a decision of the Comptroller General denying legal fees in a case involving an action arising out of an automobile accident brought by an injured Federal employee against the Federal employee driver. The Department of Justice declined to defend the latter. 34 Comp. Gen. 490 (1955).

5. The decisions dealing with legal fees and the Meritorious Claims Act offer no clear precedent for reimbursement under the circumstances here at issue. In Comptroller General decision number B-185612, 12 August 1976, an Army reserve officer was apprehended by the FBI and charged with larceny of government property. The charge was subsequently dismissed. The officer sought reimbursement in the amount of \$2,500 for civilian attorney's fees on the basis that this expense was a moral obligation of the United States arising out of a mistake persisted in by Federal law enforcement agencies. It was determined that the officer was not entitled to reimbursement for attorney's fees because the government was not required to provide him an attorney and no legal authority existed to pay the claim. It was also determined that the claim was not so extraordinary nor did it contain elements of legal liability or equity which would warrant reporting it to Congress under the Meritorious Claims Act.

6. A decision in favor of paying legal fees is number B-181660, 30 September 1974. Involved in that decision was an attempt by a Federal employee to stop a fight between two other Federal employees. The employee initiating the disturbance brought suit against the other two. Prior to being provided representation by the Department of Justice, the intervening employee incurred legal fees with his private attorney in the amount of \$225. It was found that it would be unlawful for either the Department of Justice or the employee's agency to pay this legal fee, there being no funds lawfully available for such purpose. However, the Comptroller General concluded that the claim contained such elements of equity as to be deserving of the consideration of Congress and drafted a private bill to be enacted if the Congress should concur in the recommendation.

7. Clearly, none of the foregoing decisions involving the Meritorious Claims Act offers a close analogy to the situation at hand. The fact that all involved lawsuits, as opposed to proceedings before a private organization, is itself a distinguishing characteristic. In an attempt to attain some idea of how the situation here in question might be viewed at the General Accounting Office, informal contact was made with attorneys at GAO having some familiarity with claims under the Meritorious Claims Act. Asked to consider in general terms a case in which a Federal employee had incurred substantial legal fees in defense of professional misconduct brought by his professional organization and arising out of the performance of official duties, the informal opinion on prospects for favorable action under the Meritorious Claims Act was decidedly pessimistic. This negative viewpoint appeared to be grounded on the belief that there have been others similarly situated, making reference to the guideline against use of the Meritorious Claims Act to favor one among a number in similar circumstances.

8. Even though the outcome remains doubtful, it may be worthwhile to have your claim considered under the Meritorious Claims Act. As stated previously, relief would be in the form of a private bill. While the petition would be in the form of a claim presented by you to the Comptroller General, this Office would be happy to assist in preparation of such a claim.

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cc: ✓ DDA

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